UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

CALPORTLAND COMPANY d/b/a
CALPORTLAND ARIZONA MATERIALS DIVISION, Case 28-RD-206696

Employer

and

TIM V. MAGUIRE, an Individual

Petitioner

and

GENERAL TEAMSTERS (EXCLUDING MAILERS),
STATE OF ARIZONA, LOCAL NO. 104, an affiliate of the
INTERNATIONAL BROTHERHOOD OF TEAMSTERS

Union

PETITIONER'S REQUEST FOR REVIEW

INTRODUCTION

Petitioner Tim V. Maguire is employed at Calportland Company ("Employer"). On September 22, 2017, Maguire filed a decertification petition supported by a majority of the bargaining unit employees. On September 27, 2017, the Regional Director halted the election based upon two "blocking charges" filed by General Teamsters (Excluding Mailers), State of Arizona, Local 104 ("Union") (attached). The first charge, filed on April 26, 2017, was settled without a hearing and is awaiting compliance. Compliance however has been delayed by the Region pending resolution of a second charge, filed on September 2, 2017. The later charge primarily alleges the Employer failed to engage in good faith bargaining. It is noteworthy that neither charge made any allegation that the Employer tainted the petition or election process.

Petitioner urges the Board to drastically revise its "blocking charge" policy that delays/prevents decertification elections from occurring. Congress created no explicit authority for the Board to postpone elections due to the filing of unfair labor practice charges. Furthermore, this case contains no allegation that the employees' decertification petition was tainted by Employer involvement. Finally, the Region held no hearing to determine the truth or falsity of the Union's allegations, which Petitioner believes are spurious. *See, e.g., Saint Gobain Abrasives, Inc.*, 342 NLRB 434 (2004). Indeed, no neutral designee of this Board ever reviewed the Union's allegations while also taking into consideration the Petitioner's position. The decertification petition was summarily blocked without any input from Petitioner or the majority of the bargaining unit employees who signed his decertification petition.

By his actions, the Regional Director acted outside his authority under the National Laor Relations Act ("Act" or "NLRA"), prevented an election despite the absence of any serious claim the petition process was tainted, and gave unwarranted credence to the Union's bare and self-serving allegations while diminishing and denying Petitioner and other employees' statutory *rights* to decide their representational preferences for themselves under Sections 7 and 9 of the Act, 29 U.S.C. §§ 157 and 159.

Pursuant to Board Rules & Regulations Sections 102.67 and 102.71, Petitioner Tim V. Maguire submits this Request for Review of the Regional Director's decision to block his decertification petition. The Board exists to *conduct* elections and thereby vindicate employees' right to choose or reject union representation, not to act outside the authority of the Act and arbitrarily *suspend* election petitions at the unilateral behest of unions who fear an election loss. C.f. *Gen. Shoe Corp.*, 77 NLRB 124, 126 (1948) (holding that the Board should exercise the power to set aside an election "sparingly" in representation cases because it cannot "police the

details surrounding every election," and the secrecy in Board elections empowers employees to express their true convictions); see also *NLRB v. Hart Beverage Co.*, 445 F.2d 415, 420 (8th Cir. 1971) (recognizing that "one of the purposes of the Union in filing the unfair practices charge was to abort Respondent's petition for an election"). This Request for Review should be granted because the Board's "blocking charge" rules unfairly deny employees their fundamental rights under NLRA Sections 7 and 9. The Board's "blocking charge" rules allow unions to delay all *decertification* elections, even as the Board's new Representation Election Rules rush all *certification* petitions to an election with no "blocks" allowed under any circumstances. 79 Fed. Reg. 74308, 74430-60 (Dec. 15, 2014).

The Board should put an end to this double-standard, order this election to proceed at once, and follow the lead of Chairman Miscimarra, who has urged a wholesale revision of the "blocking charge" rules. *See Cablevision Sys. Corp.*, Case 29-RD-138839, NLRB, (June 30, 2016) (Order Denying Review); *see also Baltimore Sun Co. v. NLRB*, 257 F.3d 419, 426 (4th Cir. 2001) (finding that Section 7 "guards with equal jealousy employees' selection of the union of their choice and their decision not to be represented at all."); *Conair Corp. v. NLRB*, 721 F.2d 1355, 1381 (D.C. Cir. 1983) (citing the "NLRA's core principle that a majority of employees should be free to accept or reject union representation.").

In short, this Request for Review, challenging the Board's "blocking charge" rules, raises questions of exceptional national importance. There are compelling reasons for the Board to reconsider blocking charge rules, *i.e.*, vindicating employee free choice. *See* NLRB Rules & Regulations § 102.71(a)(1) & (2), indicating that Requests for Review should be granted when "(1) . . . a substantial question of law or policy is raised . . . [or] (2) [t]here are compelling reasons for reconsideration of an important Board rule or policy." Petitioner asks the Board to:

grant his Request for Review; reactivate the election petition; and overrule, nullify, or substantially revise the "blocking charge" rules. Such action by this Board will provide more protection for employees' right to choose or reject unionization at a time of their choosing, and less protection for incumbent unions that "game the system," unilaterally block elections, and cling to power despite their unpopularity.

ARGUMENT

I. The Board and its Regional Directors lack explicit statutory authority to block an election.

In this case, neither the Petitioner nor the Employer took any actions that interfered with a free and fair election. However, even if, *arguendo*, the Employer actually committed the violations alleged in the unfair labor practices charges, "[t]he wrongs of the parent should not be visited on the children, and the violations of [the Employer] should not be visited on these employees." *Overnite Transp. Co.*, 333 NLRB 1392, 1398 (2001) (Member Hurtgen, dissenting). Employees enjoy a statutory right to petition for a decertification election under NLRA Section 9(c)(1)(A)(ii), 29 U.S.C.§ 159 (c)(i)(A)(ii) and that right should not be trampled by arbitrary rules, "bars," or "blocking charges" that prevent the expression of true employee free choice.

Employee free choice under Section 7 is the paramount interest of the NLRA. *See Pattern Makers League v. NLRB*, 473 U.S. 95, 104 (1985); *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 532 (1992); *Lee Lumber & Bldg. Material Corp. v. NLRB*, 117 F.3d 1454, 1463 (D.C. Cir. 1997) (Sentelle, J., concurring) (employee free choice is the "core principle of the Act") (quotation marks & citation omitted). An NLRB conducted secret-ballot election is the preferred forum for employees to exercise their right of free choice. *See Levitz Furniture Co. of the Pac., Inc.*, 333 NLRB 717, 725-26 (2001). Industrial stability is enhanced when employees vote in secret-ballot elections, since this ensures that employees actually support the workplace

representative empowered to speak exclusively for them. Yet, the "blocking charge" rules sacrifice this right of employee free choice based on a theory that permits an unpopular incumbent union to cling to power.

There is no statutory basis for blocking charges. Nowhere did Congress explicitly authorize the Board to ignore Section 9(e) of the Act, 29 U.S.C.§ 159 (e), which clearly states that with the filing of a petition by 30% of the bargaining unit employees "the Board shall take a secret ballot of the employees in such unit." The only express limitation on the Board's mandate to conduct and certify such elections is the provision that prevents elections from being held within 12 months of a previous election. The Act contains no other limitations. No matter how offensive the alleged unfair labor practice may be, the election should be held once there is a showing of 30% seeking an election, with challenges or objections, if any, sorted out thereafter.

As noted, the "blocking charge" practice is not governed by statute. Rather, it is a creation of the Board, theoretically based upon the Board's discretion to effectuate the policies of the Act. *Am.Metal Prods. Co.*, 139 NLRB 601, 604-05 (1962); see also NLRB Casehandling Manual (Part Two) Representation Section 11730 et seq. (setting forth the "blocking charge" procedures in detail). But the "blocking charge" rules stop employees from exercising their paramount Section 7 right to choose or reject representation, which is not a proper use of the Board's discretion.

In the absence of blocking charges there are safeguards to election fraud or significant unlawful employer activity. Objections can be made and a post-election hearing held to determine the validity of those objections and whether they impacted employee free choice. The solution to conduct that allegedly interferes with a free and fair election is not to *per se* prevent the election from occurring whenever blocking charges are filed. Indeed, that can be a very

time-consuming process due to complaint issuance, trial, and appeals. Such delays can drag on for years, violating employees' right to free choice. Such delay is particularly egregious when there exists no nexus between the allegations of the charge (i.e., a dispute over bargaining in good faith) and employees' views about the union. For example, many employees simply do not like the union they are saddled with, and will vote it out regardless of any progress or lack thereof at the bargaining table. In short, blocking charges are not merely without statutory authorization, but they undermine the Act by limiting employee free choice.

In the context of challenges to a certification petition, the Board holds the election first and settles any challenges after. If the Board can rush certification petitions to prompt elections by holding all objections and challenges until afterwards, it can surely do the same for decertification petitions. 79 Fed. Reg. at 74430-74460. It is time for the Board to eliminate its discriminatory "blocking charge" rules, which apply solely to employees who seek to refrain from supporting a union. The Board must create a system for decertification elections whereby such employees are afforded the same rights as employees seeking a certification election to support a union. The solution, if there is any misdeed, is to rely on the Board's objection policies with respect to elections.

Petitioner and his fellow employees are not sheep, but responsible, free-thinking individuals who should be able to make their own choice about unionization. The employees' paramount Section 7 rights are at stake, and those rights should not be so cavalierly discarded simply because their Employer is alleged to have committed a violation or made a technical mistake under the labor laws. Petitioners urge the Board to overrule or overhaul its "blocking charge" policies to protect the true touchstone of the Act—employees' paramount right of free choice under Section 7. *Int'l Ladies Garment Workers v. NLRB*, 366 U.S. 731, 737 (1961)

(holding that "there could be no clearer abridgment of § 7 of the Act" than for a union and employer to enter into a collective bargaining relationship when a majority of employees do not support union representation); *see also Saint Gobain Abrasives, Inc.*, 342 NLRB at 434.

II. Even if, arguendo, the Board does not totally abandon its use of blocking charges, the concept must be reevaluated and limited.

The Regional Director's reflexive application of the "blocking charge" policies ignores the fact that Petitioner and his fellow bargaining unit members may wish to be free from union representation, irrespective of any alleged employer infractions. The policies presume that the employees cannot possibly make up their own minds. This is wrong. *Overnite Transp. Co.,* 333 NLRB at 1398 (Member Hurtgen, dissenting*); Cablevision Syst. Corp.*, Case 29-RD-138839 (June 30, 2016) (Order Denying Review) (Member Miscimarra, dissenting).

The Board's jurisprudence on blocking elections must be, if not eliminated, then drastically overhauled. The Board has long operated under a system of "presumptions" that prevent employees from exercising their statutory rights under Sections 7 and 9(c)(1)(A)(ii) to hold a decertification election whenever a union files so-called "blocking charges." As discussed above, this is without statutory authority. Furthermore, the Board's practice of delaying and denying elections has faced judicial criticism. *NLRB v. Minute Maid Corp.*, 283 F.2d 705, 710 (5th Cir. 1960) ("[T]he Board is [not] relieved of its duty to consider and act upon an application for decertification for the sole reason that an unproved charge of an unfair practice has been made against the employer. To hold otherwise would put the union in a position where it could effectively thwart the statutory provisions permitting a decertification when a majority is no longer represented"); *NLRB v. Gebhardt-Vogel Tanning Co.*, 389 F.2d 71, 75 (7th Cir. 1968). Indeed, the Board's policies often deny decertification elections even where the employees are not aware of the alleged employer misconduct, and where their disaffection from the union

springs from wholly independent sources. Use of "presumptions" to halt decertification elections serves only to entrench unpopular but incumbent unions, thereby forcing an unwanted representative onto employees. Judge Sentelle's concurrence in *Lee Lumber* specifically highlights the unfairness of the Board's policies. 117 F.3d at 1463-64.

Most of these "bars" and "blocking charge" rules stem from discretionary Board policies (see, e.g., Section 11730 of the NLRB Casehandling Manual concerning "blocking charges") that should be reevaluated when industrial conditions warrant. *See, e.g., IBM Corp.*, 341 NLRB 1288, 1291 (2004) (holding that the Board has a duty to adapt the Act to "changing patterns of industrial life" and the special function of applying the Act's general provisions to the "complexities of industrial life") (citation omitted)). Here, the Board should take administrative notice of its own statistics, which show that 30% of decertification petitions are "blocked," whereas certification elections are never blocked, for any reason. See NLRB, Annual Review of Revised R-Case Rules, https://www.nlrb.gov/sites/default/files/attachments/news-story/node-4680/R-Case%20Annual%20Review.pdf.

The Board should use this case to adopt Chairman Miscamarra's views embodied in his dissent in the Rulemaking proceeding for the recent election rules. The Board should refrain from holding in abeyance decertification elections based upon "Type I" blocking charges (as are the charges in this case). As the Chairman pointed out, the policy of holding elections in abeyance based upon "Type I" blocking charges creates "the anomalous situation in which some conduct that would not be found to interfere with employee free choice if alleged in objections, because it occurs, would nevertheless be the basis for substantially delaying holding any election at all."

Here, Region 28 has done exactly that. It should be ordered to proceed to an immediate

election without delay.

III. Even under current Board law, the Region erred by blocking the election without a hearing in which the Union must first prove there is a causal nexus between the alleged unfair labor practices and employee dissatisfaction.

Using the Board's "blocking charge" rules, the Regional Director prevented the Petitioner and the rest of the bargaining unit from voting to decertify an unpopular and unwanted union, based on the Union's assertions in its unfair labor pracctice charges. The Regional Director should have held a hearing pursuant to *Saint Gobain Abrasives, Inc.*, 342 NLRB at 434, in order for the Union to meet its burden and prove there exists a causal relationship between the alleged unfair labor practices and employee dissent. In order for an unfair labor practice to taint a petition or block an election, there must be a "causal nexus" between an Employer's unfair labor practice and the employees' dissatisfaction with the Union. *Id.* "[I]t is not appropriate to speculate, without facts established in a hearing, that there was a causal relationship between the conduct and the disaffection. To so speculate is to deny employees their fundamental Section 7 rights." *Id.*

Relying on *Master Slack Corp.*, 271 NLRB 78 (1984), the Region should be required to hold a hearing and promptly determine if a causal relationship exists by analyzing a number of factors, including: "[1] the nature of the illegal acts, including the possibility of their detrimental or lasting effect on employees; [2] any possible tendency to cause employee disaffection from the union; and [3] the effect of the unlawful conduct on employee morale, organizational activities, and membership in the union." *Id.* at 84.

Here, the Regional Director made a unilateral decision to block the election based on unproven unfair labor practice allegations. However, it is hard to understand how these charges, even if true, could have led to any employee dissatisfaction with the Union. None of the charges

alleges unilateral changes that are essential terms and conditions of employment. The types of violations that cause dissatisfaction "are those involving coercive conduct such as discharge, withholding benefits, and threats to shutdown the company operation." *See Tenneco Auto, Inc. v. NLRB*, 716 F.3d 640, 650 (D.C. Cir. 2013) (finding employer's refusal to provide union addresses of replacement employees, requirement that employees obtain company permission before posting materials, and discipline of union advocate did not taint petition); *see also Goya Foods*, 347 NLRB 1118, 1122 (2006) (finding hallmark violations are those "issues that lead employees to seek union representation"). The issues involved in this case are far from hallmark violations. They are not the types of issues that cause employees "to seek union representation." *Id.*

This case should be used to reestablish, at the very least, the need to hold *Saint-Gobain* hearings. Here, the election is being blocked based upon two unfair labor practice charges filed prior to the decertification election. The first has apparently been settled and awaits compliance, but is being held up by the Region pending an investigation of the second charge, which deals primarily with the efficacy of bargaining. Petitioner believes that, even should the charges be true, neither impacts employee free choice, and there is no nexus between the conduct alleged and employee dissatisfaction with the Union. To so speculate is to deny employees their fundamental Section 7 rights." 342 NLRB at 434. At a hearing, the incumbent union will be required to bear the burden of proof concerning the existence of a "causal nexus." *See, e.g., Roosevelt Mem. Park, Inc.*, 187 NLRB 517, 517-18 (1970) (holding party asserting the existence of a bar bears the burden of proof); *Saint-Gobain Abrasives, Inc.,* 342 NLRB at 434. The Union will not be able to prove any nexus.

CONCLUSION

The Board should grant the Request for Review and order the Regional Director to promptly process this decertification petition. It should also overrule or substantially overhaul its "blocking charge" rules which are used and abused to arbitrarily deny decertification petitions.

Respectfully submitted,

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ORDER POSTPONING HEARING INDEFINITELY

Pending the investigation and disposition of a related unfair labor practice charge filed against the Employer in Case 28-CA-205100 and the informal settlement agreement pending compliance in Case 28-CA-193540,

IT IS ORDERED that the hearing in the above matter, currently scheduled to commence on October 2, 2017, at 9:00 a.m., in Phoenix, Arizona, be, and the same is, postponed indefinitely.

Dated at Phoenix, Arizona this 27th day of September 2017.

/s/ Cornele A. Overstreet

Cornele A. Overstreet, Regional Director

CERTIFICATE OF SERVICE

I hereby certify that on October 11, 2017, a true and correct copy of the foregoing Request for Review was filed electronically with the Executive Secretary using the NLRB e-filing system, and copies were sent to the following parties via e-mail, as noted:

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